

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Crim. No. 03-62-SLR
)
JOHN TIGGETT,)
)
 Defendant.)

MEMORANDUM ORDER

At Wilmington this 21st day of October, 2004, having considered plaintiff's motion to dismiss the indictment without prejudice (D.I. 50) and defendant's opposition in response thereto (D.I. 51);

IT IS ORDERED that plaintiff's motion to dismiss without prejudice is granted for the reasons that follow:

1. On June 24, 2003, a Grand Jury for the District of Delaware returned an indictment against defendant on conspiracy to import over 500 grams of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and 960(b)(2)(B) and 21 U.S.C. § 963, and attempted possession of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B) and 21 U.S.C. § 846. (D.I. 8) He entered a plea of not guilty and filed a motion to suppress evidence. (D.I. 10) An evidentiary hearing was held and on

January 29, 2004, defendant's motion to suppress was denied. (D.I. 18) The case was scheduled for pre-trial proceedings and a jury trial. (D.I. 19, 27)

2. On April 21, 2004, defendant waived his right to a trial by jury and, immediately following, the court commenced a two-day bench trial. At the close of plaintiff's case, defendant moved for judgment of acquittal based on the assertion that plaintiff had failed to demonstrate that an overt act related to the conspiracy charges occurred in Delaware and, thereby, failed to establish that venue was proper in this district. (D.I. 36 at B-2) Consistent with the Third Circuit's decision in United States v. Perez, 280 F.3d 318 (3d Cir. 2002), the court used its discretion to allow the government to reopen its case to provide additional proof to cure an insufficient presentation on venue. (Id. at B-17) Plaintiff recalled a case agent to testify regarding defendant's statements about his participation in a drug conspiracy that operated in Delaware. (Id. at B-18 - B-31) Defendant objected on the grounds that this was new information that had not been provided to him during the discovery period. Based on defendant's own statements to the arresting officer that he intended to distribute the drugs in Delaware and that a co-conspirator was a Delaware resident, as well as considering the evidence of other conduct and drug distribution in Delaware, the court found by a preponderance of the evidence that venue had

been appropriately established by plaintiff. (Id. at B-54)
Consequently, defendant's motion for judgment of acquittal based on improper venue was denied.

3. On April 22, 2004, the court found defendant guilty of the three counts charged in the indictment. Defendant moved for a new trial on June 10, 2004, to which plaintiff filed opposition. (D.I. 41, 42, 43) By memorandum order dated July 27, 2004, the court granted defendant's motion for a new trial, ordered plaintiff to supply discovery related to other conspiracies and ordered a telephone conference to discuss trial dates. (D.I. 47)

4. During the status conference held on August 26, 2004, the court expressed its concerns regarding the propriety of a prosecution against defendant in the District of Delaware. (D.I. 49) In response to this concern, plaintiff advised that it would move to dismiss the indictment without prejudice with the understanding that federal prosecutors in the Eastern District of Pennsylvania would pursue the same charges against defendant there.

5. On September 10, 2004, plaintiff formally moved to dismiss the indictment without prejudice pursuant to Federal Rule of Criminal Procedure 48(a). (D.I. 50) Defendant has filed an objection to the motion, to which plaintiff has replied. (D.I. 51, 52)

6. Federal Rule of Criminal Procedure 48(a) provides:

The government may, **with leave of the court**, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent.

(emphasis added)

7. The United States Supreme Court has acknowledged that the words "leave of court" grant discretion to the court reviewing the motion without establishing precise guidelines. Rinaldi v. United States, 434 U.S. 22 (1977). In cases where the government moves to dismiss and a defendant objects, the "principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment." Id. at 86 n. 15. The court's role on review changes when the motion to dismiss is unopposed by the defendant. There, "leave of court" depends on whether granting the motion would be in the public's best interest. Id.; see United States v. Hamm, 659 F.2d 624, 628-29 (5th Cir. 1981).

8. The Third Circuit, however, has not expounded on the standards to be applied in determining what constitutes an abuse of discretion under Rule 48(a). In re Richards, 213 F.3d 773, 786 (3d Cir. 2000). The Court has noted, however, that its sister courts have found that "refusal to dismiss is appropriate only in the rarest of circumstances." Id. at 786; see Hamm, 659 F.2d at 628-29; United States v. Cowan, 524 F.2d 504, 512-13 (5th Cir. 1975).

9. Plaintiff moves to dismiss in order to cure the venue problems identified by the court at the trial and in its order granting a new trial. (D.I. 50) Plaintiff contends that dismissing the charges in this district and prosecuting defendant in the Eastern District of Pennsylvania, where there is no venue problem, would serve the public interest in the fair administration of justice. Plaintiff denies that its motion harasses defendant; rather, the government is only trying to bring its strong case against defendant to the appropriate forum.

10. Defendant opposes the motion arguing that the public interest is not served by dismissing the case where over a year has passed since defendant's arrest in 2003 and the charges still remain unresolved. (D.I. 51) Because plaintiff knew from the inception of the case that venue was tenable, it was unfair to subject defendant to additional delays that will undoubtedly occur in the new district. Moreover, defendant asserts that plaintiff withheld evidence, until trial, that questioned the propriety of venue. Defendant argues it is unfair for plaintiff to withhold information from the defense that could have been used at the trial, and then use the information to support its motion to dismiss.

11. In response, plaintiff maintains that there was no attempt to withhold from defendant discoverable information undercutting venue. (D.I. 52) The court's denial of defendant's

Brady motion during the trial underscores this point. Further, plaintiff's motion to dismiss is made in good faith and promotes the public's interest in determining whether defendant is guilty or innocent based on the evidence and not on whether the indictment was filed in the correct district.

12. Considering this record against the applicable law, the court finds nothing demonstrating that plaintiff's motion constitutes harassment of defendant. Rather, the motion is designed to correct problems that the court identified at trial and in a post-trial order and conference. To the extent that defendant complains about delays in the adjudication of his case, the court notes that a continuance was granted in March 2004 to allow defense counsel to prepare and assemble experts. (D.I. 21, 22, 23, 24, 25)

Sue L. Robinson
United States District Judge